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IN THE

Supreme Court of the United States

October Term, 1963

No. 1037

HUDSON COUNTY NEWS COMPANY, INC.,
a domestic corporation,
Plaintiff-Appellant,

vs.

ARTHUR J. SILLS, as Attorney General of the State of New Jersey, BRENDAN T. BYRNE, as Prosecutor of Essex County, JAMES A. TUMULTY, JR., as Prosecutor of Hudson County, and the STATE OF NEW JERSEY,
Defendants-Respondents.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF *AMICUS CURIAE* IN SUPPORT OF JURISDICTIONAL STATEMENT

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Statement

(Page references are to the Appendix for Plaintiff-Appellant certified to this Court by the New Jersey Supreme Court.)

This brief *amicus curiae* is submitted on behalf of the Council for Periodical Distributors Associations, Inc. (hereinafter, "CPDA"), with the consent of all parties to this action, in support of plaintiff's jurisdictional statement.

Interest of the *Amicus Curiae*

CPDA is a national trade association of wholesalers of magazines, newspapers, paperback books and children's books. It is interested in the outcome of this litigation because if the opinion of the New Jersey Supreme Court upholding the constitutionality of 1962 New Jersey Pamphlet Laws, Chapter 174, is not reviewed and reversed by this Court, there is a substantial probability that other states will enact similar legislation. Indeed, we have been informed that at least one state legislature is presently considering such legislation.

A state statute, similar to the statute involved here, would have the same effect upon each wholesaler in that state as it has upon the plaintiff wholesaler herein. Each wholesaler subject to such a statute would either have to forego his rights under the First and Fourteenth Amendments and cease distributing "objectionable" but non-obscene literature or would have to assume the financial burden and the risk of criminal prosecution imposed by such a statute. Accordingly, the outcome of this case is of vital concern to every CPDA member.

The Action

Plaintiff seeks a declaration, pursuant to N.J.S.A. § 2a 16-50, *et seq.*, that 1962 New Jersey Pamphlet Laws, Chapter 174 (hereinafter, "the statute") is unconstitutional. The statute provides, in pertinent part:

> 1. No person, firm or corporation engaged in the business of distribution of books, magazines or publications of any kind to retail dealers, after notification in writing by a retail dealer not to send or deliver to such dealer any book, magazine or other publication, shall send or deliver to such dealer such book, magazine or other publication

2. Any person, firm or corporation which fails to comply with the provisions of section 1 of this act, after oral or written notification of such failure to comply by a retail dealer, shall forthwith remove from the possession of such dealer the book, magazine or other publication which was improperly delivered without cost or charge to the dealer. Any person, firm or corporation failing or refusing to remove such publications by the end of the second business day following notification of improper delivery shall be a disorderly person and shall be subject to a fine of not less than $500.00 or imprisonment for 30 days or both.

POINT I

1962 New Jersey Pamphlet Laws, Chapter 174, constitutes an unconstitutional interference with freedom of the press.

The statute makes it a crime, punishable by imprisonment, for a wholesaler to refuse to pick up a publication within two days after being told by a retailer to do so if the retailer had previously told the wholesaler not to deliver the publication. A crime has been committed whether the publication is obscene or non-obscene, and whether the delivery to the retailer is deliberate or accidental.

The purpose and effect of this statute is to prevent the distribution of "objectionable" but non-obscene literature, and the manner of regulation is such that the statute constitutes an unconstitutional interference with freedom of the press.

A. The Purpose and Effect of the Statute is to Prevent the Distribution of "Objectionable" But Non-Obscene Publications.

Freedom of the press, guaranteed by the First and Fourteenth Amendments, includes, of course, freedom of distribution (*Lovell* v. *Griffin*, 303 U. S. 444 (1938)), and

when state action interferes with freedom of the press this Court has always looked through the form in which the action is clothed and examined the action's substance. *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963); *Smith* v. *California*, 361 U. S. 147 (1959).

The substance of the statute here is revealed by the statute's effect, and there can be no question as to the effect of the statute. If a significant number of retailers—either on their own initiative or, more likely, as in the present case,[1] under pressure from vigilante censor groups such as the National Organization for Decent Literature—tell a wholesaler not to deliver a particular publication, the wholesaler has two alternatives. One alternative is to continue distributing the publication to those retailers who want it and thereby run the risk of accidental misdelivery. If he follows this course he must either bear the permanent and substantial expense of having men and trucks available to pick up publications on two days' notice or he must be prepared to face criminal prosecution and imprisonment.

The second alternative is to stop distributing any magazine to which a substantial number of retailers object. This course of action will always be safer and, in the case of many publications, it may be cheaper as well.

The result of this statute, therefore, is that many publications which are objected to by censor groups and retailers will not be distributed by retailers at all, will not reach any newsstands, and will, in all probability, be denied to the people of New Jersey. Because of the breadth of the statute such publications may cover the entire spectrum of literature from the crassest hard-core pornography through the most innocent of children's books. For, under the statute, the New Jersey public can be effectively denied non-obscene "girlie" magazines, *Reader's Digest*, *National Review*, *New Republic*, *Commonweal* and *Jack and Jill*.

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[1] See affidavit of L. Vaughn Swanwick (72a-75a).

That this will be the effect in the case at bar is made perfectly plain by the uncontradicted affidavit of plaintiff's Circulation Manager, L. Vaughn Swanwick. Mr. Swanwick testifies:

> "The statutory requirement that undesired material be picked up within two days after notice is entirely unworkable. The cost of making such pickups would be, according to my personal knowledge of the economics of distribution, staggering and unbearable. The cost of employing the additional drivers and trucks necessary to make such pickups would amount to a minimum of $50,000.00 a year. This additional cost would make it unprofitable for Hudson County News Company to distribute magazines and other publications. The publishers fixed newsstand price prevents passing this cost on to the public. If this added cost is to be borne by either the retailer or Hudson County News Company, *the unavoidable result will be to substantially curtail the distribution of publications in the 83 communities that we service.*" (Emphasis added) (74a-75a.)

This obvious effect was also noted and referred to by the New Jersey Superior Court Justice who initially heard this case. That Court said:

> "Wouldn't it be cheaper for you not to send them out in the first instance, don't have them published? If nobody wants the Saturday Evening Post, Readers' Digest, Time or Life, don't print them. Look how much money you will have saved in the first instance, instead of printing all these books, Saturday Evening Post—there is your affidavit, Life, Readers' Digest. If you don't ship them out, you don't have to pick them up and you fellows will save more than this $50,000 extra that Mr. Swanwick said." (13a-14a.)

The restrictive purpose of the statute is made clear not only by a consideration of the statute's effect but by an examination of its legislative history as well. The statute under consideration here is a direct outgrowth of

a Report of a Joint Commission created by the New Jersey Legislature, which Report was concerned with the distribution of "border-line" pornography and not merely with obscene literature as defined in *Roth* v. *United States*, 354 U. S. 476 (1957). The present statute was enacted to replace the even more restrictive statute recommended in this Report after the statute contained in the Report had been vetoed by the Governor on the ground that it was probably unconstitutional. The vetoed statute was accompanied by a statement which provided, in pertinent part:

> "This bill is intended to place responsibility for handling *objectionable* material upon the retailer since he will have to order it, and, at the same time, to prevent distributors from disseminating the increasing supply of obscene publications for which they claim no responsibility." (Emphasis added.) (62a.)

Not only does the statute have the clear purpose and effect of preventing the distribution of constitutionally protected publications, but no alternative or additional purposes exist. All of the evils which could possibly justify the existence of this statute are already covered by New Jersey Statutes which do not impair freedom of expression. Tie-in sales involving obscene material are prohibited by N.J.S.A. § 2A:115-3.1 (Supp. 1963); the dissemination of obscene material is made a misdemeanor by N.J.S.A. § 2A:115-2 (Supp. 1963), and distribution may be enjoined pursuant to N.J.S.A. § 2A:115-3.5 (Supp. 1963). There are numerous provisions dealing with prevention of and protection from fire in the New Jersey Statutes, and N.J.S.A. § 40:48-2 authorizes municipalities to pass any ordinances necessary for the public health, safety and morals.

Moreover, it cannot be claimed that the statute is designed to prevent wholesalers from deliberately delivering to retailers publications which the retailers do not wish. If this were the legislative purpose, the criminal act would

be the deliberate delivery of the undesired publications and not, as here, the failure to promptly pick up publications which might have been accidentally misdelivered.

It is clear, therefore, that to view this statute as anything other than what it is—a state enforced means by which pressure groups can effectively prevent the distribution of literature to which they object, whether obscene or not—is to sacrifice substance to form and jeopardize the First Amendment.

B. The Statutory Interference With Free Speech is Not Reasonably Restricted to Any Evil With Which the Statute Might Deal.

When, as here, a statute impairs rights guaranteed by the First Amendment, it is not enough that the legislation have a rational basis. The legislation can only be upheld if it is needed to protect the public interest from a clear and present danger. *Board of Education* v. *Barnette*, 319 U. S. 624, 639 (1943); *Thomas* v. *Collins*, 323 U. S. 516 (1945).

Statutes restricting freedom of expression are only justifiable when there is imminent danger that society will suffer a serious substantive evil unless freedom of expression is restricted. *Bridges* v. *California*, 314 U. S. 252, 263 (1941). The extent of the statute's interference with free speech must be weighed against the legitimate interests of the state. In this case, the interference with free speech is great, while the legitimate interest of the state which can only be protected by such interference is nonexistent.

Even if the statute did serve some legitimate state interest (and it does not), any such interest could be protected as well by measures which did not unnecessarily impair the distribution of constitutionally protected literature. This is not to suggest that this Court must tell a State legislature the means to use in carrying out its legislative duties. But when First Amendment freedoms are involved this Court must guarantee that the State legisla-

tion is "reasonably restricted to the evil with which it is said to deal." *Butler* v. *Michigan*, 352 U. S. 380, 383 (1957). Thus, no matter what legitimate purpose the State might suggest, the present statute, by unnecessarily preventing the distribution of non-obscene literature, is unconstitutional in that it burns down "the house to roast the pig." *Ibid.*; *Schneider* v. *State*, 308 U. S. 147 (1939).

POINT II

A State may not make the type of non-activity covered by this statute a crime.

The State courts have long recognized that not every act can be made a crime. *Ex parte Smith*, 135 Mo. 223, 36 S. W. 628 (1896) (ordinance prohibiting association with reputed thieves, prostitutes, etc.); *City of Watertown* v. *Christnacht*, 39 S. D. 290, 164 N. W. 62 (1917) (ordinance prohibiting association with reputed prostitutes); *Ex parte Drexel*, 147 Cal. 763, 82 Pac. 429 (1905) (statute prohibiting issuance of trading stamps).

This Court has more recently acknowledged the fact that the police power does not grant States unlimited license to create crimes. *Lambert* v. *California*, 355 U. S. 225 (1957) (ordinance requiring convicted felons to register with chief of police held unconstitutional); *Robinson* v. *California*, 370 U. S. 660 (1962) (statute making narcotics addiction a crime held unconstitutional); see *Weems* v. *United States*, 217 U. S. 349 (1910).

This principle, that the State may not make any act which it chooses a crime, has special application in the area of First Amendment freedoms, for as this Court said in *Thomas* v. *Collins*, 323 U. S., at 540:

> "If the exercise of the rights of free speech and free assembly cannot be made a crime, we cannot think this can be accomplished by a device of re-

quiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and from imposing a penalty for violating such a restraining order."

So, here, if it cannot be a crime to distribute non-obscene literature, neither can it be a crime to fail to collect such literature, once accidentally distributed. For, by making it a crime to fail to pick up non-obscene literature the State has, in fact, effectively prohibited its distribution in the first place.

CONCLUSION

For all the above reasons 1962 New Jersey Pamphlet Law, § 174, is unconstitutional and this Court should note probable jurisdiction of this appeal.

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